

1 DAVID A. ROSENFELD, Bar No. 058163  
WEINBERG, ROGER & ROSENFELD  
2 A Professional Corporation  
1001 Marina Village Parkway, Suite 200  
3 Alameda, California 94501-1091  
Telephone 510.337.1001  
4 Fax 510.337.1023

5 Attorneys for Petitioner and Charging Party

6

7

UNITED STATES OF AMERICA

8

NATIONAL LABOR RELATIONS BOARD

9

10 2 SISTERS FOOD GROUP, INC. ) Case. 21-CA-38915  
11 Employer ) 21-CA-38932

12 and )

13 UNITED FOOD AND COMMERCIAL ) **BRIEF IN SUPPORT OF EXCEPTIONS**  
14 WORKERS INTERNATIONAL UNION, ) **TO THE ADMINISTRATIVE LAW**  
LOCAL 1167 ) **JUDGE'S DECISION**

15 Charging Party/Petitioner )

16

17 2 SISTERS FOOD GROUP, INC. ) Case 21-RC-21137  
18 Employer )

19 and )

20 UNITED FOOD AND COMMERCIAL )  
21 WORKERS INTERNATIONAL UNION, )  
LOCAL 1167 )

22 Charging Party/Petitioner )

23

24

25

26

27

28

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I. INTRODUCTION..... 1

II. THE TERMINATION OF MS. TRESPALACIOS ..... 1

III. THE MAINTENANCE OF UNLAWFUL RULES WARRANTS A NEW ELECTION ..... 2

IV. THE EMPLOYER ENGAGED IN CAPTIVE AUDIENCE MEETINGS DURING THE WEEK BEFORE THE ELECTION ..... 9

V. CAPTIVE AUDIENCE MEETINGS WERE CONDUCTED ON THE DAY OF THE ELECTION ..... 10

VI. THE EMPLOYER UNLAWFULLY ENLISTED A BARGAINING UNIT EMPLOYEE TO PASS OUT T-SHIRTS AND BEANIES ON THE DAY OF THE ELECTION AND PASSED OUT 100 T-SHIRTS AND BEANIES ON THE DAY OF ELECTION IN FRONT OF SURVEILLANCE CAMERAS..... 11

VII. THE USE OF CAMERAS ON THE DAY OF THE ELECTION DURING THE VOTING PERIODS IS IMPROPER..... 15

VIII. THE EMPLOYER ENGAGED IN UNLAWFUL CAMPAIGNING IN THE VOTING AREA..... 18

IX. THE EMPLOYER UNLAWFULLY DELAYED VOTERS AND SINGLED OUT ELIGIBLE VOTERS BY ESCORTING THEM ON THE PROPERTY..... 18

A. THE EMPLOYER MAINTAINED ADDITIONAL GUARDS AND SUMMONED THE MORENO VALLEY POLICE ON THE DAY OF THE ELECTION..... 20

X. THE PRIOR UNREMEDIED UNFAIR LABOR PRACTICES INTERFERED WITH THE ELECTION ..... 23

XI. THE BOARD AGENT IMPROPERLY VISIT THE PLANT THE DAY BEFORE THE ELECTION WITHOUT HAVING THE UNION PRESENT ..... 23

XII. REMEDIES ..... 24

XIII. CONCLUSION ..... 26

**TABLE OF AUTHORITIES**

**Federal Cases**

*NLRB v. Burnup & Sims*,  
379 US 21 (1964) ..... 1

**State Cases**

*Asmus v. Pacific Bell*,  
96 Cal.Rptr.2d 179 (2000)..... 7

*Guz v. Bechtel National, Inc.*,  
100 Cal.Rptr.2d 352 (2000)..... 7

*Scott v. Pacific Gas and Electric Co.*,  
46 Cal.Rptr.2d 427 (1995)..... 7

**NLRB Cases**

*Antioch Rock & Ready Mix*,  
327 NLRB 1091 (1999)..... 6

*Boca Raton*,  
323 NLRB 555 (1997)..... 6

*Cambridge Tool & Mfg.*,  
316 NLRB 716 (1995)..... 5

*Cardinal Home Products, Inc.*,  
338 NLRB 1004 (2003)..... 4

*Catalina Yachts*,  
250 NLRB 283 (1980) *enforced per curiam*,  
679 F.2d 180 (9th Cir. 1982)..... 13

*Clark Equipment Co.*,  
278 NLRB 498 (1986)..... 4, 5

*Conolon Corporation*,  
175 NLRB 27 (1969)..... 12

*Cook Family Foods, Ltd.*,  
311 NLRB 1299 (1993)..... 13

*Cross Pointe Paper Corp.*,  
330 NLRB 658 (2000)..... 17

*Delta Brands*,  
344 NLRB 252 (2005)..... *passim*

*Double D Construction Group*,  
339 NLRB 303 (2003)..... 3

1	<i>F. W. Woolworth,</i>	
2	310 NLRB 1197 (1993).....	13, 16
3	<i>Farah Mfg.,</i>	
4	187 NLRB 601 (1970).....	4
5	<i>Freund Baking Co.,</i>	
6	336 NLRB 847 (2001).....	5,6
7	<i>Fruehauf Corp.,</i>	
8	274 NLRB 403 (1985).....	23
9	<i>Great Dane Trailers Indiana, Inc.,</i>	
10	252 NLRB 67 (1980).....	13
11	<i>Great Western Coca Cola Bottling Co.,</i>	
12	256 NLRB 520 (1981).....	13
13	<i>Harborside Healthcare,</i>	
14	343 NLRB 906 (2004).....	23
15	<i>Hopkins Nursing Care Center,</i>	
16	309 NLRB 958 (1992).....	5
17	<i>IRIS U.S.A., Inc.,</i>	
18	336 NLRB 1013 (2001).....	4, 5
19	<i>Longs Drug Stores,</i>	
20	347 NLRB 500 (2005).....	8
21	<i>Lott's Elec. Co.,</i>	
22	293 NLRB 297 (1989) <i>enforced,</i>	
23	891 F.2d 281 (3d Cir. 1989).....	13
24	<i>Mervyn's,</i>	
25	240 NLRB 54 (1979).....	4
26	<i>National Medical Hosp. of Compton,</i>	
27	287 NLRB 149 (1987) <i>enforced,</i>	
28	907 F.2d 905 (9th Cir. 1990).....	13
	<i>Nissen Foods (USA) Co.,</i>	
	272 NLRB 371 (1984).....	13
	<i>Opryland Hotel,</i>	
	323 NLRB 723 (1997).....	4
	<i>Pacific Beach Hotel,</i>	
	342 NLRB 372 (2004).....	4
	<i>Quest International,</i>	
	338 NLRB 856 (2003).....	21
	<i>R.L. White Co.,</i>	
	262 NLRB 575 (1982).....	13

1	<i>Randell Warehouse of Ariz., Inc.,</i>	
	347 NLRB 591 (2006).....	14, 16, 17
2	<i>Reeves Rubber, Inc.,</i>	
3	252 NLRB 134 (1980).....	13
4	<i>Roadway Package System, Inc.,</i>	
	302 NLRB 961 (1991).....	16
5	<i>Sabine Towing &amp; Transportation,</i>	
6	226 NLRB 422 (1976).....	19
7	<i>Safeway, Inc.,</i>	
	338 NLRB 525 (2002).....	4, 5
8	<i>SEIU Local 121 RN,</i>	
9	355 NLRB No. 40 (2010).....	3
10	<i>Servomation of Columbus,</i>	
	219 NLRB 504 (1975).....	23
11	<i>Seville Flexpack Corp.,</i>	
12	288 NLRB 518 (1988).....	18
13	<i>Southwire Co.,</i>	
	277 NLRB 377 (1985).....	16
14	<i>St. Joseph's Hospital,</i>	
15	262 NLRB 1385 (1982).....	5
16	<i>Tappan Co.,</i>	
	254 NLRB 656 (1981).....	13
17	<i>Waco, Inc.,</i>	
18	273 NLRB 746 (1984).....	13
19	<b><u>Other Authorities</u></b>	
20	Kate E. Andrias “ <i>A Robust Public Debate: Realizing Free Speech in Workplace Representation</i>	
21	<i>Elections Workplace Representation Elections,</i>	
	112 Yale L. J. 22415 (2003).....	10
22	Craig Becker “ <i>Democracy in the Workplace: Union Representation Elections and Federal Labor</i>	
23	<i>Law,</i> ” 77 Minn. L. Rev 775 (1993).....	10
24	Note “‘ <i>Captive Audience’ Meetings in Union Organizing Campaigns: Free Speech or Unfair</i>	
	<i>advantage,</i> ”	
25	56 Hastings L. J. 169 (2004) .....	10
26	Ben Sachs “ <i>Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing</i> ”	
	123 Harv. L. Rev 655 (2010) .....	26
27	John W. Teeter “ <i>Between the Buttons: Employer Distribution of AntiUnion Insignia,</i> ”	
28	24 N. M. L Rev. 69 (1994).....	13

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

International Labor Organization: 357th Report of the Committee on Freedom of Association  
(June 18, 2010)..... 25

**Federal Regulations**

29 C.F.R. 102.119 ..... 11

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**I. INTRODUCTION**

In this brief in support of our exceptions, we address the specific exceptions filed by the Charging Party and Petitioner. We support the decision of the ALJ that Xonia Trespalacios was illegal fired but offer some additional support which the ALJ ignored. We argue that the election should be set aside on multiple grounds ignored or rejected by the ALJ. Finally, we address the need of the Board to revise its remedies.

**II. THE TERMINATION OF MS. TRESPALACIOS**

The Administrative Law Judge (“ALJ”) has analyzed the termination of Ms. Trespalacios without acknowledging that the Employer knew she has engaged in union activity. The ALJ has not directly addressed the fact that Ms. Trespalacios was engaged in union activity at the time of the incident for which she was terminated. This triggers a different analysis. In *NLRB v. Burnup & Sims*, 379 US 21 (1964), the Court held that the employer’s good faith belief that the employee engaged in unprotected activity is not sufficient to support the employer’s discipline. In cases where there is protected concerted activity involved, the employer must prove improper conduct and good faith is insufficient where the General Counsel demonstrates that the alleged conduct did not occur. The ALJ failed to utilize this analysis in determining that Ms. Trespalacios was unlawfully terminated because 1) Ms. Reilly could not have had a good faith belief that Ms. Trespalacios engaged in an assault and 2) the alleged assault did not occur.

The ALJ also made number of other errors in reaching her conclusion, which of course, we support. We address those errors in support of her ultimate conclusion.

First, she failed to consider that the Union offered a CD of the cafeteria incident which would plainly show that Ms. Trespalacios did not nudge or bump Ms. Flores when she came back to talk to her at the end of the conversation with her. Rather, that CD shows very clearly that she leaned over and talked to Ms. Flores “into her ear” without bumping her.

The ALJ furthermore failed to note that Ms. Reilly lied about talking to Eric Rodriguez, the employer lawyer, before the termination was effective. Her deliberate mistruth on this issue should be used to discredit her entire testimony and should be a source of finding of patent animus and

1 lack of good faith belief that the alleged conduct occurred.

2 Finally, the ALJ incorrectly quoted a translation concerning the statement given by Ms.  
3 Flores. Ms. Reilly conceded that the statement as she understood it did not suggest that Ms.  
4 Trespalacios threatened to assault Ms. Flores. Rather, the statement was to the effect Ms. Flores  
5 would lose her job (that is, kicked out of the plant) not that there would be any assault. This is  
6 critical because it once again shows no good faith belief on Ms Reilly's part.

7 Finally, the ALJ failed to find that the speech given on the Monday before the election  
8 constitutes a violation Section 8(a)(1) because of its coercive nature. In effect, all workers were  
9 threatened with termination for engaging in talking about the union to other workers. Also, the  
10 EXCLUDED video proves the employer was capable of surveillance of such union activity in the  
11 cafeteria further adding to the coercive nature of the meeting.

### 12 **III. THE MAINTENANCE OF UNLAWFUL RULES WARRANTS A NEW ELECTION**

13 The General Counsel alleged that there were 5 rules maintained by the company which  
14 violate the Act. Those rules are Rules 11, 12, 28, 33 and 35. See Complaint paragraph 5 and Joint  
15 Exhibit 1, Exhibit C. In addition to these 5 rules, the employer has maintained an unlawful  
16 arbitration agreement that forces employees to waive their right to file charges with the National  
17 Labor Relations Board. See Paragraph 6 of the Complaint. The ALJ has found that each of these  
18 rules was unlawful.

19 The ALJ, however, used the wrong standard. The Board should hold that any such rules  
20 are irrebuttably unlawful. Or, in the alternative, such rules should be held presumptively unlawful  
21 subject to proof of a compelling business reason to mainTAIN such rules based on special or  
22 extraordinary circumstances.

23 As another alternative, the Board should hold that any such rules have a tendency to  
24 interfere with the employee's Section 7 activity where they could be reasonably construed by the  
25 employees to interfere with the activity. The Board has recently restated this standard in a case  
26 involving a union leaflet:

27 "The test for determining whether the Respondent's flyer violated Section  
28 8(b)(1)(A) is whether the flyer reasonably tended to restrain or coerce  
employees in the exercise of their Section 7 rights, which includes the right

1 to refrain from paying union dues or fees when there is no contractual  
2 obligation to do so. In appropriate circumstances, the Board will infer an  
3 unlawful threat concerning the collection of dues and fees. It is thus our  
4 responsibility to evaluate the entirety of the flyer's message in its overall  
5 context, to determine if such a threat has been made. The test "is whether the  
6 words could reasonably be construed as coercive, whether or not that is the  
7 only reasonable construction." *Double D Construction Group*, 339 NLRB  
8 303, 303-304 (2003). See also *Bay Cities Metal Trades Council*, *supra*, 306  
9 NLRB at 985.

10 See *SEIU Local 121 RN*, 355 NLRB No. 40 at page 2-3 (2010) (footnote excluded)

11 The ALJ relied on *Delta Brands*, 344 NLRB 252 (2005). Decision, 16:11. This Board  
12 should overrule *Delta Brands* and find that where unlawful rules are maintained during the critical  
13 period, they presumptively interfere with Section 7 rights and necessarily interfere with the  
14 laboratory conditions. The ALJ indicated that there was no finding that employees were prohibited  
15 from engaging in any of the activity limited by the rules. This is, of course, exactly the wrong  
16 inquiry. There was no evidence that employees engaged in the specific activity prohibited by the  
17 rules. Thus, the rules were entirely coercive and effective. Even if some employees engaged in  
18 such conduct, the rest of the bargaining unit was effectively coerced into refraining from the  
19 conduct which is prohibited. If employer rules are to have any meaning, they are enforceable and  
20 should be presumed enforced. Thus, the presumption should be that the employees were  
21 effectively prohibited in engaging in activity encompassed by the rules because the rules prohibited  
22 the activity. The ALJ's presumption is exactly contrary because she assumes that employees did  
23 engage in the activity where there was no such evidence other than some employees who did  
24 engage in some activity which was not plainly prohibited by the rules, such as leafleting out side of  
25 the plant. The law should be clear that the maintenance of unlawful rules by an employer during  
26 the critical period not only violates the Act, but warrants setting aside an election. Here we have  
27 four unlawful rules and a fifth unlawful arbitration policy.

28 In support of our position we quote Chairman Liebman's dissent in *Delta Brands*. This  
Board can and should easily turn this into the majority opinion:

Until today, under Board law, it was well settled that an employer's mere  
maintenance of an unlawful rule is not only objectionable conduct, but also  
sufficient grounds to set aside an election. n1 This result follows from the  
reasonable tendency of the rule to interfere with employees' free choice, by  
inhibiting them from engaging in the conduct prohibited by the rule. n2 As the  
Board has explained, "the maintenance of the rule, not its date of

1 promulgation, enforcement, or the effects it had on employees' specific  
2 conduct, is what is significant." n3 We have applied these established  
3 principles very recently. See *Pacific Beach Hotel*, 342 NLRB No. 30, slip op.  
at 2-3 (2004) (setting aside election, based on maintenance of an overbroad  
handbook policy prohibiting solicitation on company property).

4 n1 See, e.g., *Freund Baking Co.*, 336 NLRB 847 (2001) (setting aside election  
5 based on handbook rule prohibiting disclosure of confidential information,  
including terms and conditions of employment).

6 n2 *Id.*, citing *Farah Mfg.*, 187 NLRB 601, 602 (1970). See also *IRIS U.S.A.,*  
7 *Inc.*, 336 NLRB 1013 (2001), citing *Mervyn's*, 240 NLRB 54, 61 fn. 16  
(1979).

8 n3 *Freund Baking*, *id.* fn. 5. The same approach is followed in unfair labor  
9 practice cases. See, e.g., *Cardinal Home Products, Inc.*, 338 NLRB 1004  
(2003) (setting aside election in consolidated unfair labor practice and  
representation case).

10 The no-unauthorized-solicitation rule involved in this case was facially  
11 unlawful. See *Opryland Hotel*, 323 NLRB 723, 728-729 (1997) (employer  
may not lawfully require employees to seek prior approval for solicitations).  
12 The majority does not dispute that the rule was generally disseminated to  
employees, in a policy manual to which employees were expected to adhere.  
13 On this occasion, however, the majority holds the Union to additional  
requirements of proof. To set aside this election, the Union must show: (1)  
14 that the policy manual containing the unlawful rule was actually given to  
multiple employees during the critical period; (2) that the Employer enforced  
15 the rule or otherwise "called the attention" of employees to it; or (3) that  
employees were, in fact, influenced in voting or deterred by the rule from  
16 engaging in Section 7 activity. There is no basis in our case law for such  
requirements. And, on the record here, it is clear in any case that the rule  
17 reached enough employees, recently enough, to make a potential difference in  
the election results.

18 I.

19 Well-established legal principles govern this case. With respect to an  
20 overbroad workplace rule, the only question is whether maintenance of the  
rule could reasonably have affected the election results. See, e.g., *Pacific*  
21 *Beach Hotel*, *id.* at 3. n4 As with respect to objectionable conduct in general,  
n5 this is an objective test. "The mere maintenance of an overbroad rule can  
22 affect the election results because employees could reasonably construe the  
provision as a directive from their employer that they refrain from engaging in  
23 permissible Section 7 activity." *Pacific Beach Hotel*, *ibid.* A union is not  
required to prove that the rule was enforced or that it actually had an effect on  
24 employees. E.g., *Freund Baking*, *id.* at 847 fn. 5. Rather, where an  
objectionable rule is contained in an employee handbook, employees who  
25 received the handbook are presumed to be aware of the rule and to have been  
affected by it. As a result, the election must be set aside. n6

26  
27 n4 Where the rule has also been found to be an unfair labor practice, the test is  
whether it is "virtually impossible to conclude" that maintenance of the rule  
28 could have affected the election results. *Safeway, Inc.*, 338 NLRB 525, 526 fn.  
3 (2002), citing *Clark Equipment Co.*, 278 NLRB 498, 505 (1986).

1  
2 n5 E.g., *Cambridge Tool & Mfg.*, 316 NLRB 716, 716 (1995); *Hopkins Nursing Care Center*, 309 NLRB 958, fn. 4 (1992).

3 n6 See *Pacific Beach Hotel, id.* (handbook given to all employees upon hire; "no evidence that the employees were ever told that they could ignore the  
4 policy"); *Freund Baking, supra* at fn. 5 (each employee received handbook and was required to acknowledge that handbook was read and understood);  
5 *IRIS U.S.A., supra* at 1015 (handbook distributed to all employees; new hires required to sign acknowledgment). See also *St. Joseph's Hospital*, 262 NLRB  
6 1385 (1982) (setting aside election based on overly broad no-distribution/no-solicitation rule in handbook and in policy manual).

7  
8 In the face of this authority, the majority insists that its decision is "not a departure from established Board law." I disagree. Here, the majority  
9 reallocates the burden of proof to the objecting party to show more than that the rule was maintained. n7

10 n7 This burden allocation is also diametrically opposed to the burden imposed where the objectionable rule is also found to violate Sec. 8(a)(1): i.e., that the  
11 employer must show that it is virtually impossible to conclude that the misconduct could have affected the election result. *Safeway, id.* at fn. 3; *Clark Equipment, id.* at 505.

12  
13 No prior decision of the Board has ever required such a showing. n8 The majority relies on only a single case involving an employer rule, *Safeway, supra*,  
14 in which a panel majority refused to set aside a decertification election, concluding that the employees would not reasonably have been affected by  
15 the rule at issue, because of the incumbent union's mitigating role. n9 As Member Liebman's dissent in that case explained, the holding in *Safeway* was  
16 at odds with the precedent I cite here. And, because no incumbent union was present in this case to inform employees of their rights, the majority extends  
17 *Safeway's* invalid premise even further.

18 n8 The majority asserts that is not requiring the Union to show that the rule was (as the hearing officer found) "fresh in the minds of the employees," but  
19 is only finding the "absence of such freshness" to be a "factor to be considered." It seems clear, however, that the majority would refuse to  
20 overturn any election where an objectionable rule was not affirmatively shown to be "fresh" in employees' minds.

21 n9 The *Safeway* majority itself described the incumbent union's presence as "a material fact in [its] evaluation of the likely impact of the confidentiality rule  
22 on the election results." *Ibid.*

23 The majority's reliance on decisions that involve objectionable conduct other than the maintenance of unlawful rules is also misplaced. n10 An employer  
24 rule is categorically different from coercive action taken on a particular occasion against particular employees. Obviously, to justify setting aside an  
25 election, the specific coercive action (e.g., a supervisor's threat) must be shown to have been disseminated to other employees. An unlawful handbook  
26 rule, however, represents an ongoing term and condition of employment, applicable to all employees and presumably known to them. On the basis of  
27 this distinction, the Board has always correctly presumed--at least in the absence of evidence to the contrary--that all employees who are subject to the  
28 rule are reasonably likely to be affected by it. Contrary to the majority, no

1 "indulgence" in speculation is required to justify this presumption.

2 n10 *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092-1093 (1999) (threats);  
3 *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (threats). Significantly,  
4 conclusively presumes that the election was adversely affected.

5 II.

6 Applying the Board's well-established principles to the facts here should  
7 compel the Board to set aside the election.

8 The unlawful rule at issue was included in the Employer's policy manual for  
9 employees during the critical period. The rule defined "vending, soliciting, or  
10 collecting contributions for any purpose unless authorized by management"  
(emphasis added) as "prohibited conduct" that "will not be tolerated by the  
11 Company." The majority does not dispute that the policy manual was  
12 generally distributed to employees. That is clearly sufficient to invalidate the  
13 election result, under controlling Board law.

14 Even if more evidence of dissemination were required, it is also undisputed  
15 that at least three newly hired employees were given the Employer's policy  
16 manual shortly before the election. All three employees were required to sign  
17 written acknowledgments of receipt. At least two of them--a sufficient number  
18 to change the election result--were required by their written acknowledgments  
19 to "read," "familiarize myself," and "understand" the manual's contents during  
20 the critical period (i.e., between the filing of the representation petition and  
21 the election), and to "abide by" all the rules set out therein. n11 In the light of  
22 this evidence, the majority's characterization of the rule as "buried in the  
23 handbook" is inaccurate, and it is illogical not to infer that these two  
24 employees, at a minimum, were made aware of the unlawful rule. n12

25 n11 One of these employees was hired and received the manual during the  
26 critical period. The other, having received and signed for the manual three  
27 days before the critical period began, was effectively required to review it  
28 over an ensuing period of days that clearly overlapped the critical period. It is  
the maintenance of the rule during the critical period that is relevant, not the  
date on which any employee was given the handbook. *Freund Baking, supra*.

n12 It is beside the point that, as the majority observes, "there is no evidence  
that any employee was in fact deterred, by the rule, from engaging in Sec. 7  
activity." As noted above, employees' subjective reactions to objectionable  
conduct are irrelevant.

III.

Finally, even applying the majority's erroneous requirements, the only  
reasonable inference in view of the evidence is not only that the unlawful rule  
was disseminated to the unit through the manual, but also that employees'  
"attention" was called to the unlawful rule with coercive impact.

The hearing officer found, based on the testimony of the Employer's own  
witnesses, that the Employer expects all employees to "adhere to all the rules  
and policies contained within [the manual]." In this connection, as noted  
above, and as in *Freund Baking, supra*, each of the three employees who were  
given the policy manual shortly before the election was required to sign a

1 written receipt mandating that he read and "familiarize" himself with the  
2 manual's contents, in two cases during the critical period. The Employer, in  
3 short, did everything practically necessary to publicize the unlawful rule to its  
4 employees, short of reading it aloud to them.

5 In finding no evidence that employees' "attention was called" to the rule, the  
6 majority appears to presume that employees will not read their employer's  
7 policy manual--notwithstanding each employee's written promise to do so and  
8 the manual's explicit warning of discharge for noncompliance. The majority  
9 also appears to presume that employees will not become aware of a particular  
10 rule that is "merely present" in a "much larger" policy manual (36 pages here)  
11 unless the rule is explicitly cited to them. Surely we should at least presume  
12 that employees are aware of formal rules that their employer intends to  
13 communicate to them and that could affect their tenure. Indeed, in California,  
14 where the Employer is located, policy manuals are frequently given the force  
15 of contracts that create rights and obligations enforceable in court. n13 To  
16 operate on the presumption that employees nevertheless routinely ignore the  
17 rules imposed in such critical documents flies in the face of that reality. n14

18 n13 See *Guz v. Bechtel National, Inc.*, 100 Cal.Rptr.2d 352, 366-371 (2000);  
19 *Asmus v. Pacific Bell*, 96 Cal.Rptr.2d 179, 183 (2000); *Scott v. Pacific Gas*  
20 *and Electric Co.*, 46 Cal.Rptr.2d 427, 432-433 (1995). "When an employer  
21 promulgates formal personnel policies and procedures in handbooks, manuals,  
22 and memoranda disseminated to employees, a strong inference may arise that  
23 the employer intended workers to rely on these policies as terms and  
24 conditions of their employment, and that employees did reasonably so rely."  
25 *Guz*, 100 Cal.Rptr.2d at 371.

26 n14 I doubt that the majority would be inclined to bar an employer from  
27 disciplining an employee for an infraction listed in a policy manual, in the  
28 absence of evidence either that the employee actually read the manual or that  
the employee's attention was specifically "called" to the pertinent rule. As for  
the length of the policy manual, the majority offers no hint as to exactly how  
"large" the policy manual must be before it will presumptively remain unread  
by employees.

The majority also maintains that the Employer had an established practice of  
permitting worksite solicitations, which negated its written rule to the  
contrary. This finding is entirely unsupported. The rule, by its own terms,  
prohibited all solicitations "not authorized by management." Even if the  
Employer had previously permitted nonunion solicitations without  
preauthorization, the Board could not presume that the Employer would have  
been equally tolerant of union solicitation, and that disparate enforcement  
would not have occurred. Nor could the Board presume, without supporting  
evidence, that the two newly hired employees who were required to read and  
comply with the policy manual shortly before the election were made aware of  
any unwritten exception to the unlawful rule. It is therefore not the case, as the  
majority states, that "employees had no reason to believe that Section 7  
activities would be forbidden." Employees rather had every reason to believe  
that Section 7 solicitation not preapproved by management would be  
punishable. n15

n15 Significantly in this context, all three of the other rules alleged by the  
Union to be objectionable restricted activity only "on Company property" or  
"during working time."

1 The majority's approach, in short, is internally inconsistent. On one hand, the  
2 majority refuses to infer that employees were aware of the written, publicized  
3 rule, despite good reason to do so. On the other hand, the majority eagerly  
presumes that all employees were aware of unwritten exceptions to the rule,  
without any evidentiary support.

4 IV.

5 At bottom, the majority's approach to this case seeks a way around controlling  
6 precedent. It has not found one--and, if it had, the majority would still run up  
7 against the record evidence here. Because the Employer's rule was unlawful  
and because the maintenance of that rule reasonably tended to coerce  
8 employees, I would set the election aside. I would reach the same result, on  
the record here, even applying the new and dubious requirements imposed by  
the majority. Accordingly, I dissent.

9 *Delta Brands, Inc.*, 344 NLRB 252, 254-256 (2005).

10 The rules are all enforced according to an employer witness. (TR. 332) The rules were  
11 enforced against Xonia Trespalacios and the employer made a public spectacle out of that  
12 enforcement. The employer enforced other rules against other individuals. There is no evidence  
13 the employees ignored the rules or that they engaged in conduct in violation of the rules. The  
14 employer provided the rules in English and Spanish and provided an orientation that explained the  
15 content of the rules. Cf. *Longs Drug Stores*, 347 NLRB 500 (2005).

16 In addition to the rules cited above, the employer also maintained other unlawful rules.  
17 Although not subject to an unfair labor practice complaint, they are subject to the objections. Rule  
18 6 is overbroad. It is overbroad because it refers to "release of confidential information" without  
19 explaining to the employees that confidential information which is encompassed within the rule  
20 does not encompass confidential information about wages, hours and working conditions. This  
21 statement is overbroad.

22 The overbreadth is confirmed by the confidentiality agreement which is attached to the  
23 same exhibit. Information which is deemed confidential includes anything "not publicly known."  
24 Wages, working conditions and other matters which employees may disclose are "not publically  
25 known." Thus, the definition encompasses such a breadth of information that it necessarily  
26 includes information which employees may freely disclose in the course of Section 7 activities.

27 The confidentiality agreement is also overbroad for another reason. It prohibits employees  
28

1 from disclosing information that might be useful to the union in engaging in lawful boycotting  
2 activity. For example, it prohibits the employees from disclosing customers whom the union could  
3 lawfully boycott. (See in particular paragraph 4.) This is overbroad since it limits Section 7  
4 economic activity just like a rule prohibiting striking.

5 The language is also overbroad because it would prohibit disclosure “for a period of 2 years  
6 immediately following the termination employment...” If an employee is terminated unlawfully as  
7 has occurred here, the employee would be prohibited from engaging in boycotting and disclosing  
8 to customers the unlawful conduct. The confidentiality rule is thus overbroad in and of itself along  
9 with the non-disclosure agreement.

10 Here the illegal rules were effective to muzzle, restrict and stifle the employees. Their  
11 Section 7 rights were sabotaged. There is no evidence that employees ignored these rules. The  
12 rules had the desired effect, singly or together. The maintenance of them and the enforcement of  
13 rules in general, warrants a new election and the appropriate notice.

14 **IV. THE EMPLOYER ENGAGED IN CAPTIVE AUDIENCE MEETINGS DURING THE**  
15 **WEEK BEFORE THE ELECTION**

16 The Board should use this opportunity to prohibit captive audience meetings by the  
17 employer at any time during the critical period. The captive audience meeting held on the Monday  
18 before the election illustrates the need to create new rules protecting employee free choice. Tracy  
19 Reilly called all the workers into meetings in the canteen, showed them a videotape which  
20 purported to show the incident involving Xonia Trespalacios and read a statement prepared by the  
21 Section 7 saboteur.

22 This meeting was coercive for several reasons. First, it was conducted in a focal point of  
23 authority because the meeting area contains security cameras and the meeting was conducted by  
24 the highest ranking manger in the plant. Second, the employees were forced to watch a video of an  
25 incident caught by the same security cameras which monitor them day in and day out. Third, it was  
26 the plant manager who read them the scripted statement. Fourth, the plant manager blamed at least  
27 one other union supporter for alleged misconduct which was the subject of the pending unfair labor  
28 practice proceedings where the General Counsel had alleged illegal firings by 2 Sisters. Finally,

1 the video which they saw was an inaccurate portrayal of the incident involved.

2 Captive audience meetings are unnecessary. The employer has every right under Section 8  
3 (c) to communicate with employees but shouldn't be allowed to do so during the critical period in a  
4 captive audience meeting where employees are required to attend. Alternatively, the Board should  
5 expand the captive audience rule to prohibit captive audience speeches within a week of the  
6 election. We recognize that ALJ has not overruled unfortunate current Board precedent. The  
7 Board once prohibited such captive audiences meetings. It is time to return that that rule of law or  
8 to prohibit captive audience meetings for a longer period before the election. We now ask this  
9 Board to do so.<sup>1</sup>

10 **V. CAPTIVE AUDIENCE MEETINGS WERE CONDUCTED ON THE DAY OF THE**  
11 **ELECTION**

12 There was substantial activity on the day of the election which amounted to captive  
13 audience meetings. Fernando Rivera, one of the Section 7 saboteurs, conducted a meeting of a  
14 group of employees immediately before the election. (TR. 572-573). Section 7 saboteurs  
15 remained in the locker room where employees were required to be present and thus effectively  
16 captured them for purposes of communicating with them just before the election. (TR. 572-573  
17 and 585) Section 7 saboteurs also went from table to table, thus effectively capturing employees  
18 who were seated at those tables during their breaks or lunches. (TR. 574- 575; 584-588 and 492).  
19 Each of these meetings was, in effect, captive audience meeting.

20 Ms. Reilly and Mr. Singh, the owner of the company, stationed themselves at tables in the  
21 cafeteria. Since there was a limited number of tables, this effectively forced employees either to sit  
22 at management's occupied tables or be under surveillance by them. (TR. 838).

23 Section 7 saboteurs were located in the smoking area. (TR. 578). Because California law  
24 limits smoking to designated areas, this was in effect capturing those employees for purposes of  
25 campaigning against the union.

26 <sup>1</sup> See, Craig Becker, "*Democracy in the Workplace: Union Representation Elections and Federal*  
27 *Labor Law*," 77 Minn. L. Rev 775 (1993); Note " 'Captive Audience' Meetings in Union  
28 *Organizing Campaigns: Free Speech or Unfair Advantage*," 56 Hastings L. J. 169 (2004); Kate E.  
Andrias, "*A Robust Public Debate: Realizing Free Speech in Workplace Representation*  
*Elections*," 112 Yale L. J. 22415 (2003).

1 In summary, on the day of the election, the repeated incidents of small group meetings  
2 constituted captive audience meetings with employees, which interfered with the laboratory  
3 conditions. The ALJ rejected this argument on the ground that employees were not captive when  
4 they were in various areas of the plant. (Decision, pp. 18-19.) To the contrary, the employees were  
5 required to be in those areas of the plant and therefore it was easy enough for management to  
6 approach them in those areas where they were required to be and address them. This is precisely  
7 what a captive audience meeting is. The ALJ is however correct that had the Employer actually  
8 invited them to attend the meeting voluntarily that would not have had been a captive audience  
9 meeting. These meetings however are clearly captive audience meetings because the Employer's  
10 representatives of Section 7 saboteurs caught employees in the areas where they could not leave  
11 and harangued them about voting against the Union.

12 **VI. THE EMPLOYER UNLAWFULLY ENLISTED A BARGAINING UNIT EMPLOYEE**  
13 **TO PASS OUT T-SHIRTS AND BEANIES ON THE DAY OF THE ELECTION AND**  
14 **PASSED OUT 100 T-SHIRTS AND BEANIES ON THE DAY OF ELECTION IN FRONT**  
15 **OF SURVEILLANCE CAMERAS**

15 Management made a decision 2 or 3 days before the election to pass out t-shirts and  
16 beanies. (TR. 825). It is undisputed that Laura Perez, who normally works in the smock room,  
17 was asked by management to pass out t-shirts and beanies from her location in the smock room.  
18 (TR. 825). One of the Section 7 saboteurs asked one of the supervisors to get the beanies to  
19 provide to Laura for purposes of distributing to the employees. (TR. 729). This occurred on the  
20 day of the election. (TR. 823).<sup>2</sup> The law is clear that an employer may not ask a bargaining unit  
21 employee to hand out employer campaign paraphernalia. This type of conduct is improper because  
22 it makes that employee in effect, a supporter of the employer, regardless of how the employee  
23 wishes to express her Section 7 rights.<sup>3</sup> Here, the employer asked Laura to pass out the beanies  
24 and t-shirts and that conduct alone interferes with the election.

25 <sup>2</sup> Roxanne Harris who was called by the employer is simply wrong about when this occurred. (TR.  
26 709-718). In fact, abusing Ms. Harris, a bargaining unit employee, by getting her to testify  
27 something patently untrue should warrant referral to the General Counsel's office for the  
appropriate attorney disciplinary proceedings. See 29 C.F.R. 102.119.

28 <sup>3</sup> Ms. Reilly's testimony that Ms. Perez was selected to pass out the beanies and t-shirts was done  
"so it was given fair" makes no sense and doesn't excuse the decision to ask a bargaining unit  
member to pass out the campaign material. (TR 825).

1 The t-shirts and beanies were passed out by the same person who passed out mandatory  
2 aprons and other clothing which employees were required to wear. Thus it was easy enough for  
3 employees to believe that the employer supported, if not compelled them, to take and wear the t-  
4 shirts. This adds a further element of coercion.

5 Not only was Laura asked to pass the items out, but she effectively became the agent of the  
6 employer. She was the only one authorized in the cloak room. (TR. 720) She was asked by  
7 management to pass them out. This alone is objectionable. *The Conolon Corporation*, 175 NLRB  
8 27 (1969). Management observed her passing out the items. Management provided them to her.  
9 Management interfered at one point when it appeared as though agency employees were getting the  
10 t-shirts. When Laura stepped into the cafeteria to pass them out she was stopped by one of the  
11 Section 7 saboteurs. (TR. 724). All this demonstrates that she was acting as the agent of the  
12 management, which both authorized her to pass out the campaign material and ratified her conduct.

13 Here, the passing out of the t-shirts and beanies was observed and could be observed by  
14 management. This makes the passing out of the t-shirts *per se* objectionable. The record  
15 establishes that there were cameras in the immediate area which could observe the passing out of  
16 the t-shirts and the beanies. (TR. 826). There were cameras in the cloak rooms so that employees  
17 would be observed coming into the cloak room and leaving the cloak room, thereby enabling the  
18 employer to identify which employees picked up the t-shirts and beanies. (TR. 724 and 726).<sup>4</sup>  
19 The fact that there were active cameras in the area alone is sufficient to interfere with the  
20 laboratory conditions necessary to any fair election.

21 The existence of the cameras forced employees to pick up the beanies and t-shirts so that it  
22 would appear to management, who could review the tapes as they were maintained, who did and  
23 did not support the union. This necessarily coerces employees into attempting to show support for  
24 the company by picking up the company paraphernalia. The Board has long held that if the  
25 employer wants to pass out such campaign material, it must do so without surveillance. The  
26 employees must be totally free to pick up the material or reject it without management

27 \_\_\_\_\_  
28 <sup>4</sup> It is undisputed that the employees knew where all the cameras were located. Only 2 of them  
were covered up so the employees well knew that they could be observed.

1 interference.<sup>5</sup> It is particularly important where the company maintains tapes or files of the video  
2 cameras for a period of time. Employees should thus be concerned if the union wins an election,  
3 the employer will review the tapes to see who did and did not support the union. The maintenance  
4 of cameras under these circumstances is particularly pernicious and considerably interferes with  
5 the election process. *Cook Family Foods, Ltd.*, 311 NLRB 1299 (1993) (unlawfully pressuring  
6 employees to wear antiunion T-shirts); *Lott's Elec. Co.*, 293 NLRB 297 (1989) (unlawfully  
7 distributing antiunion buttons), *enforced*, 891 F.2d 281 (3d Cir. 1989); *Seville Flexpack Corp.*, 288  
8 NLRB 518 (1988) (unlawfully requesting workers to wear antiunion buttons); *National Medical*  
9 *Hosp. of Compton*, 287 NLRB 149 (1987) (unlawfully coercing employee to wear antiunion  
10 button), *enforced*, 907 F.2d 905 (9th Cir. 1990); *Nissen Foods (USA) Co.*, 272 NLRB 371 (1984)  
11 (unlawfully soliciting employees to wear antiunion buttons, interrogating them for not doing so,  
12 and applying dress code in discriminatory fashion); *R.L. White Co.*, 262 NLRB 575 (1982)  
13 (unlawfully encouraging employees to wear procompany T-shirts); *Great Western Coca Cola*  
14 *Bottling Co.*, 256 NLRB 520 (1981) (unlawfully polling employees by repeatedly offering them  
15 antiunion buttons); *Tappan Co.*, 254 NLRB 656 (1981) (offering antiunion T-shirts to workers  
16 interfered with election); *Reeves Rubber, Inc.*, 252 NLRB 134 (1980) (unlawfully urging  
17 employees to wear items with antiunion slogans); *Great Dane Trailers Indiana, Inc.*, 252 NLRB  
18 67 (1980) (unlawfully soliciting employees to wear antiunion stickers); *Catalina Yachts*, 250  
19 NLRB 283 (1980) (*unlawfully distributing antiunion buttons and T-shirts*), *enforced per curiam*,  
20 679 F.2d 180 (9th Cir. 1982). The Board has made it clear that the use of cameras to record  
21 Section 7 activities violates the Act. Here the decision to ask for a t-Shirt, choose not to ask for  
22 one or to reject one is Section 7 activity. The Board has stated:

23 Our precedent establishes that an employers unexplained photographing of  
24 employees engaged in Section 7 activities has a tendency to intimidate  
25 employees. *Waco, Inc.*, 273 NLRB 746, 747 (1984); *F. W. Woolworth*, 310  
26 NLRB 1197 (1993). This precedent rests on three premises: (1) during an  
election campaign, an employer may be displeased with employees who  
exhibit support for the union or fail to support an employer's campaign  
against the union, e.g., by accepting union campaign literature or by

27 <sup>5</sup> The Board should return to its earlier cases that any passing out of anti-union material is coercive  
since employees who chose not to wear the insignia or T-shirts are marked as anti-employer.  
28 *See, generally*, John W. Teeter, "Between the Buttons: Employer Distribution of AntiUnion  
Insignia," 24 N. M. L. Rev. 69 (1994).

1 declining to accept employer literature; (2) the photographing and  
2 videotaping of employees engaged in such activity constitutes permanent  
3 recordkeeping, which is more than “mere observation”; and therefore (3)  
4 employees could reasonably fear “that the record of their concerted activities  
5 might be used for some future reprisals.”

6 *Randell Warehouse of Ariz., Inc.*, 347 NLRB 591, 594 (2006) (footnote omitted)

7 In addition to cameras, the facts show there were supervisors in the area who were involved  
8 in the handing out of the t-shirts and beanies and thus observed the conduct. (TR. 470, 481, 509,  
9 514 and 737). Ms. Marquez was in the area for a period of time, both to control and to observe the  
10 conduct. (TR. 512). Supervisors took workers to get the t-shirts. (TR. 470, 481, 509). Alone these  
11 incidents warrant setting aside the election.

12 Another factor weighs heavily in finding this conduct objectionable. Although the passing  
13 out of t-shirts and beanies may not always constitute a gift of significant value, it is improper to do  
14 so the day of election just before voting occurs. The Board has adopted many rules making the  
15 election day a solemn occasion and minimizing the influences and pressures on employees.  
16 Captive audience speeches, changing of paycheck practices and raffles are all prohibited within 24  
17 hours of the election. And that prohibition extends to both the union and employer. Here, the  
18 beanies and t-shirts had not been passed out except when the plant opened in 2008 and for some  
19 new employees. (TR. 823-24). Suddenly, the day of election, 150 were passed out. This gift,  
20 available only on the day of the election, should alone constitute objectionable conduct. In  
21 conjunction with the entire circumstances it plainly interferes with the laboratory conditions,  
22 particularly those which should govern on the day of the election.<sup>6</sup>

23 The employer also discriminated against employees with respect to the handing out of the t-  
24 shirts and beanies. (TR. 519, 522-524, 819). This effectively singles out union supporters.

25 All in all, this considerable misconduct of desperately passing out t-shirts and beanies and  
26 asking the bargaining unit employee to do so in the presence of the cameras and supervisors plainly  
27 violates the Act. Alone this conduct requires a new election. The ALJ rejected this suggestion on

28 <sup>6</sup> The fact that Ms Marquez and a Section 7 saboteur had to intervene shows that this became  
somewhat of a circus atmosphere making the giving out of these items the focus of employees’  
attention rather than on the important decision of voting.

1 the theory that employees voluntarily took the beanies and t-shirts. But the voluntariness is  
2 irrelevant; employees knew there was surveillance, knew that an employee had been authorized by  
3 management to pass them out and were subject to surveillance when they were being passed out.  
4 These are precisely the evils that the Board has long identified in allowing employer campaign  
5 material to be passed out. As demonstrated, however, the Employer asked an employee to pass the  
6 t-shirts out and they were passed out in ways that could be subject to surveillance by the Employer.  
7 This violates well settled Board law and is objectionable conduct.

8 **VII. THE USE OF CAMERAS ON THE DAY OF THE ELECTION DURING THE VOTING**  
9 **PERIODS IS IMPROPER**

10 Although somewhat a novel issue, the use of so called security cameras is becoming an  
11 increasingly important problem with respect to election conduct in employer facilities where there  
12 is increased use of security cameras. This employer has 30 cameras operative in the plant, all of  
13 which record on a real time basis. (TR. 790-93).<sup>7</sup> On the day of the election, only two of the  
14 cameras were covered up so that the employees could see that they were not useable. The only (2)  
15 two that were covered were in the immediate vicinity of the voting area. Otherwise, at least 28  
16 cameras were operative throughout the entire day. (TR. 698). There were at least (3) three places  
17 where the feed from the cameras could be observed: the security guard office, Ms. Reilly's office  
18 and the technical department office. (TR. 590-593 and 785-790).

19 The evidence furthermore demonstrates that every employee would have to pass by 4 to 5  
20 operating cameras on the day of the election on the way to the training room to vote. (TR. 790 -  
21 793) The detailed routes by which employees have to travel were explained by Tracy Reilly, and  
22 each route would require employees to walk in front of operative cameras. (TR. 785-790) Even  
23 though the two cameras at the actual polling place were covered up, employees had to go through  
24 the cloak room, pass the washing areas and other areas where there were operational security  
25 cameras.

26 The security cameras in this case may have served a legitimate business function when

27 \_\_\_\_\_  
28 <sup>7</sup> The employer was able to produce video tapes of two incidents in the facility showing that it has  
the power to record virtually everything that happens in the facility.

1 normal operations are occurring, but nonetheless, the employer concedes they could have been  
2 turned off. The employer presented no evidence that would have interfered with its operations or  
3 caused any risk to have the cameras turned off immediately before the voting began and turned  
4 back on immediately after the voting ended.<sup>8</sup> This would have been the appropriate action in a  
5 facility where there are so many cameras.

6 *Randell Warehouse, supra*, governs this issue. Here the employer offered no reason to  
7 have the cameras on during the Section 7 activity of voting (or not voting).<sup>9</sup> The employer  
8 concedes there was no reason to have the cameras on in the immediate voting area. Absent an  
9 explanation to the employees or even on this record why it was necessary to capture them on film  
10 going to vote and returning from voting (or choosing not to), the employer's conduct requires a  
11 new election.<sup>10</sup>

12 The vice of cameras is obvious. First, it allows the employer to determine who is and who  
13 is not voting. It thus allows the employer to encourage those employees it believes are *employer*  
14 *sympathizers* to vote. It allows the employer to coerce employees because they know that they are  
15 being watched whether they decide to vote or not to vote. It is particularly pernicious in this case  
16 where the employer maintains electronic files of the security information so that the employer can  
17 later review it to determine who may or may not have voted.

18 The Board has strict rules about maintaining lists of those who have voted. The use of  
19 cameras simply exacerbates this problem, particularly where the cameras are maintained in such  
20 close proximity to the traveling path of employees.

21 The Board's treatment of employer photographing as compared to mere  
22 observation of open union activity is instructive. As discussed, the Board has  
23 found that absent a proper justification, an employer may not photograph  
24 employees openly engaged in protected concerted activities because such  
photographing has a tendency to intimidate. *F. W. Woolworth, supra*. By  
contrast, an employer may lawfully observe employees engaged in protected

25 <sup>8</sup> If the employer was concerned about security issues, it could have done the same thing other  
employers have done: shut down production lines briefly to allow employees to vote.

26 <sup>9</sup> Employees can be concerned even as to whom they are seen with going to vote: if they travel  
with a group of union supporters to the polling area this will be recorded and becomes coercive.

27 <sup>10</sup> Here the fact that the cameras could be observed at three remote locations makes the use of them  
28 more intrusive than mere observation by supervisors. It is thus more coercive than simply  
recording for future use since it can be observed contemporaneously at other sites.

1 activities when those activities are conducted openly on or near company  
2 premises. See *Roadway Package System, Inc.*, 302 NLRB 961 (1991);  
3 *Southwire Co.*, 277 NLRB 377, 378 (1985). Thus, the Board has recognized  
4 that making a permanent visual record of employees Section 7 activity  
5 without a legitimate justification has a reasonable tendency to coerce  
6 employees, even when other forms of observation may not be objectionable.

7 *Randell Warehouse of Ariz.*, *supra*, 347 NLRB at 596.

8 The use of cameras to record who votes and does not vote creates an indelible and  
9 permanent list of those who have voted. It is a more accurate list than if a member of management  
10 made a written list or checked names off on a list. Such conduct is automatic grounds for a new  
11 election. *Cross Pointe Paper Corp.* 330 NLRB 658 (2000). Again, the employer conceded that all  
12 employees are aware of the cameras so presumably, all employees who voted or chose not to vote  
13 were aware the employer was keeping a record of who voted. (TR. 774).

14 The union sought during the course of the pre-election conference to monitor this. The  
15 Board Agent improperly refused this request. This case serves as the perfect example of why  
16 employers must be required, absent compelling circumstances, to turn off all security cameras  
17 during the voting period. The ALJ rejected this objection quoting several Board cases that have  
18 allowed employers' security cameras to operate even though they happen to catch protected  
19 concerted activity. (Decision p. 21.) These are Section 8(a)(1) cases; not cases involving  
20 objectionable conduct. When Board elections are conducted, an employer has to change its  
21 business, at least to accommodate the laboratory conditions required of such elections. For  
22 example, the employer must make space available for the election, must certainly cover all  
23 cameras, must keep supervisors out of the area and do other things to attempt to ensure laboratory  
24 conditions on the day of the election. It is not quite "business as usual." Thus, the Section 8(a)(1)  
25 cases are inapplicable.

26 The Board should take this case, given the extensive record of security cameras, to direct  
27 that in future elections employers must turn off the security cameras at least to the extent they  
28 show employees traveling to the voting area and return traveling so to avoid the necessary

1 interference with elections.<sup>11</sup> This would be required only during the time employees are voting or  
2 going to voting locations.

3 **VIII. THE EMPLOYER ENGAGED IN UNLAWFUL CAMPAIGNING IN THE VOTING**  
4 **AREA**

5 The evidence established that there were posters placed in proximity to the voting area.  
6 (TR. 475, 482-483, 507, 527, 552, 840 and 846). Campaign by the use of posters in the immediate  
7 voting area and in the route traveled to the voting area violates the laboratory conditions. The ALJ  
8 ignored the clear and un rebutted evidence of the anti-union posters. (Decision p. 19).

9 **IX. THE EMPLOYER UNLAWFULLY DELAYED VOTERS AND SINGLED OUT**  
10 **ELIGIBLE VOTERS BY ESCORTING THEM ON THE PROPERTY**

11 If secret ballot voting is to be central to the Act, the employer cannot interfere in any  
12 respect with respect to the right of employees to vote. Here, there were at least 6 employees who  
13 were substantially delayed in voting. The delay occurred both at the guard shack and in the  
14 method by which they were escorted into the plant. The testimony establishes that these  
15 employees were delayed up to at least a half hour or in some cases potentially more. (TR. 474,  
16 488, 541-542, 556, 609, 624, 640-642, 895 and 896). The employer, moreover, escorted the  
17 employees into the facility to vote. (TR. 846-849 and 902; See also Un. Ex 4 p 1 reflecting guard's  
18 notes about escorting voters).

19 It is undisputed that the employer chose to delay and escort four of the discriminatees from  
20 the prior Board case and the current discriminatee, Xonia Trespalacios, and delayed them from  
21 voting for substantial periods of time. They were forced to wait at a guard shack and escorted one  
22 by one into the voting area. By both delaying their voting and singling them out for an escort, this  
23 interfered with the laboratory conditions.

24 The employer under these circumstances must allow these employees who show up to vote  
25 to freely vote. Here there was no risk of any of the employees interfering with the facility. They  
26 simply could have walked along the outside of the plant to the stairs leading to the voting area.

27 <sup>11</sup> We recognize that maybe circumstances where it is necessary for clear security reasons or other  
28 reasons to keep the cameras operating. There is no such evidence in this case of any such clear  
need.

1 They would not have been in the plant area or in any secure area. There was no risk whatsoever  
2 and employees who showed up to vote could have simply walked into the plant, had the employer  
3 instructed the security guard to allow them to do so. Here, the employer is well aware of the  
4 problem and yet delayed each of the employees. In fact, when Javier Castro showed up, Eric  
5 Rodriguez delayed his voting. Thus, this was part of the deliberate effort by the employer to  
6 interfere with the rights of the employees to vote.

7 The Board has created an unquestioned rule that any attempt by the employer to restrict  
8 those who vote is objectionable conduct:

9 We find that Respondent's conduct was a serious and improper interjection  
10 into the Board's election processes. In effect, Respondent, in posting the  
11 guard with the list of off-duty employees, was arrogating to itself the right to  
12 determine unilaterally who should cast ballots--challenged or unchallenged--  
13 at any given location. These are questions for the Board agent to resolve,  
14 and the Board has held that any individual who presents himself at the polls  
15 has a right to cast at least a challenged ballot (unless in a category  
16 specifically excluded by the Board in a decision). Further, any individual has  
17 a right to assert his claim to the right to vote directly to the Board agent.  
18 More importantly, though, no party has a right to prejudge that claim or  
19 prevent the individual from presenting it to the Board agent.

20 *Sabine Towing & Transportation 226 NLRB 422 (1976)*

21 Here although all those who were delayed or restricted ultimately voted, *Sabine* teaches that  
22 the employer may not use its property rights to interfere in the right to vote, particularly where that  
23 right is asserted against obvious union supporters. The employer should have allowed them to  
24 come into the voting area unrestricted and allowed them to vote unrestricted and unhindered.

25 The ALJ minimized this by noting that the employees did eventually vote. (Decision p.17)  
26 Nothing could be more coercive than to single out union supporters, substantially delaying them  
27 and subjecting them to harassment and by escorting them on the way to vote. If the Employer  
28 wants to have the election in its premises, it must allow employees free access to vote without  
singling them out, delaying them and escorting them into the plant. The employer can easily  
arrange with its security personnel to admit anyone who wants to vote. The conduct here warrants  
a new election.

The employer unlawfully refused to allow Pablo Andres to be the union's chosen observer  
in the election. (TR. 474).

1 The employer interfered with the election in another way. Ms. Reilly explained that  
2 employees who wanted to leave the line had to ask supervisors. The employer generally controls  
3 those who leave the line. (TR. 798). Here, however, employees who wanted to leave the line to go  
4 vote had to ask for permission. This interferes with their right to freely vote, constitutes a form of  
5 interrogation, is coercive and requires a new election.

6 **A. THE EMPLOYER MAINTAINED ADDITIONAL GUARDS AND SUMMONED**  
7 **THE MORENO VALLEY POLICE ON THE DAY OF THE ELECTION**

8 The laboratory conditions were interfered with when the employer had somewhere between  
9 6 and 10 additional guards posted in and about the facility on the day of the election. (TR. 666-  
10 667). Normally there was 1 guard stationed at the plant. (TR. 689-690). Nonetheless, the  
11 employer had substantially more guards at the entire facility on the day of the election. The  
12 maintenance of guards changes the atmosphere and is coercive. The employer asked that  
13 additional Moreno Valley police be stationed at the neighboring Fresh & Easy plant. (Un. Ex. 4, p.  
14 4 of 4).

15 Here, the employer asserts that it had a business reason for having additional guards. The  
16 only basis for bringing the additional guards was wholly pretextual if not ridiculous. The employer  
17 put on evidence that there was an incident the day the petition was filed which was several months  
18 before the election, where union supporters entered company property for a brief demonstration.  
19 Irrespective to what happened, this was before the election petition was filed and before the critical  
20 period. Additionally, there were no further incidents whatsoever of any problems or trespass. (TR.  
21 696, 830). There were no threats of any misconduct. Finally, there was no reason for the employer  
22 to believe that there would be any trespass issues on the day of the election because the union  
23 would be well aware that any such conduct could be objectionable conduct. Furthermore, the  
24 employer had 25 to 30 cameras from which it could observe any conduct. There simply was no  
25 reason to have additional security except to create the coercive atmosphere which interfered with  
26 the laboratory conditions.

27 The cameras which could be reviewed in 3 locations in real time observed leafleting and  
28 organizing activity. (TR. 834). Thus, the additional guards could monitor any such activity the day

1 of the election. And this also is coercive.

2 The coercive atmosphere was furthermore exacerbated when, towards the end of the day  
3 before the voting was completed, Jeremy Chew asked that the Moreno Valley Police be summoned  
4 to the plant because he had heard that there were 1,000 people massed to march on the plant.  
5 (TR.630, 385 and 699) This was wholly fantasy on Mr. Chew's part. Nonetheless, several squad  
6 cars appeared and remained for a period of time thus, once again interfering with the atmosphere  
7 which should not have included both the extra security guards and the extra police. Employees  
8 were well aware that there were extra security guards. (TR. 468 and 552)

9 The Board has addressed the use of guards and overruled an objection in a recent case on  
10 the following basis:

11 First, the increased security in question was basically only one unarmed  
12 guard, supplemented during shift changes by one dog, and on election day  
13 by an additional, armed guard. Second, the guard patrolled the perimeter of  
14 the property only, and entered the plant only to use the restroom or vending  
15 machines. The dog, when it was on the site, remained inside the security  
16 vehicle except when it was accompanying the guard on perimeter patrol, and  
17 it never entered the plant. Also, the guards and dog were not in or even near  
18 the polling area on the day of the election. Finally, the guards and dog did  
19 not engage in any coercive or even questionable conduct towards the  
20 employees. Indeed, the hearing officer stated that there was "no credible  
21 testimony" that the guards "interrogated, surveilled, or confronted  
22 employees."

23 *Quest International*, 338 NLRB 856, 857 (2003).

24 Here each of these factors is different. The increased guards were only on the day of  
25 election. The guards increased from one to at least 6 but perhaps 10. The guards were involved in  
26 controlling access to the plant by voters, observers,<sup>12</sup> participants in the pre-election conference,  
27 had access to the cameras monitoring election activity, and were in the plant. They had direct  
28 contact with employees. The police were called on a pretext.

29 In summary, both the substantially increased guard presence and the summoning of the  
30 Moreno Valley Police interfered with the laboratory conditions. The ALJ rejected this objection  
31 on the ground that it was reasonable to have extra security guards because of an incident which had

---

12 They prevented the union's chosen observer from acting as the observer. (TR. 474).

1 occurred in May prior to the filing of the petition. (Decision. p. 18). First, this was pre-petition  
2 conduct. Second, it was a single and sole incident where employees and organizers came on the  
3 plant to deliver a demand for recognition. There was no threat of any continued activity and  
4 certainly no threat that such activity would occur on the date of the election which the Union  
5 would, of course, understand would interfere with the election. There were not extra security  
6 guards present between that pre-petition conduct and the election. There was no excuse  
7 whatsoever to have additional security guards except to intimidate employees. And as noted, that  
8 has the effect because security guards were used to interfere with employees who came to vote.  
9 Similarly, Mr. Rodriguez did questioned at least one employee who came to vote. Thus, they were  
10 not innocent bystanders but actively participated in the misconduct.

11 **X. THE PRIOR UNREMEDIED UNFAIR LABOR PRACTICES INTERFERED WITH**  
12 **THE ELECTION**

13 It is undisputed that the General Counsel issued a complaint alleging that there were four  
14 terminations of employees. The case was tried and the General Counsel established a prima facie  
15 case which was not rebutted by the employer nor was a defense put on before the evidence was  
16 concluded. Those allegations included joint employer allegations with staffing agencies for the  
17 employees. Whether or not the joint employer relationship is proven, the employer concedes that  
18 when it opened the new Riverside plant, it invited all the agency employees to continue working  
19 the plant as 2 Sisters employees. (TR. 819). Thus, it is a certainty that the four employees, had  
20 they not been unlawfully terminated would have been present in the plant, would have been able to  
21 campaign for the union and would not have been on the outside as terminated discriminatees. Each  
22 of those four employees showed up to vote and as described above, each was substantially delayed  
23 in voting.

24 The employer moreover made use of these terminations. In Tracy Reilly's speech on  
25 Monday before the election in which she outlined the reasons for terminating Xonia Trespalacios,  
26 she expressly referred to another union employee who had been terminated for misconduct. (See  
27 GC. Ex. 4).

28 Here, the employer's litigation of this issue and failure to resolve these unfair labor

1 practices encompassed the entire critical period. It wasn't until after the election that the employer  
2 eventually settled these cases. It is important in that regard to note that the settlement agreement  
3 does not contain a non-admissions clause. Effectively the employer has now conceded that it  
4 violated the Act when it terminated these four employees.

5 The ALJ improperly refused to allow the Charging Party and Petitioner to prove that these  
6 employees had been unlawfully terminated, and that the employer's refusal to reinstate them and  
7 then to make examples out of them on the day of the election interfered with the laboratory  
8 conditions. This is exacerbated by the employer mistreatment of the 4 discriminatees who were  
9 delayed in voting and escorted into the facility to vote.

10 The Board considers pre-petition conduct. Indeed, very recently the Board found that  
11 supervisor solicitation of authorization cards was sufficient serious to warrant setting aside an  
12 election. *Harborside Healthcare*, 343 NLRB 906, 912 at fn. 21 (2004).

13 *Ideal Electric* notwithstanding, the Board will consider prepetition conduct  
14 that is sufficiently serious to have affected the results of the election. See,  
15 e.g., *Servomation of Columbus*, 219 NLRB 504, 506 (1975) ("Of course, if  
16 threats or violence generates an atmosphere of fear and coercion which  
17 persists to the date of the election and taints the conditions under which it is  
18 conducted, the election will be set aside regardless of the time when the  
19 misconduct occurred, the end to which it was directed, or the persons  
20 responsible for its perpetration."). See also *Royal Packaging, supra*;  
21 *Gibson's Discount Center, supra*; and *NLRB v. Savair, supra*. In addition,  
22 the Board will consider evidence of prepetition conduct that adds "meaning  
23 and dimension" to related post-petition conduct. See, e.g., *Fruehauf Corp.*,  
24 274 NLRB 403, 408 (1985)."

25 Here the termination of 4 employees and numerous statements in violation of section  
26 8(a)(1) rise far beyond the level of seriousness attributed to the solicitation of authorizations cards  
27 in *Harborside*.<sup>13</sup> That misconduct should be considered on its own as objectionable and to  
28 underscore the other misconduct here.

## **XI. THE BOARD AGENT IMPROPERLY VISIT THE PLANT THE DAY BEFORE THE ELECTION WITHOUT HAVING THE UNION PRESENT**

25 Erik Rodriguez, the employer lawyer, testified that the Board agent visit the plant the day  
26 before to arrange a suitable place for the election. The Union was neither notified or invited. This  
27

28 <sup>13</sup> This supports the argument that the termination of Xonia Trespalacios was pretextual.

1 improperly favored the employer and is wrong. There is no reason the Union could not have been  
2 notified and invited to attend.

3 **XII. REMEDIES**

4 The Order should require intranet posting. This matter is before Board in other cases and  
5 the Board should adopt that remedy in this case.

6 The Board should require the posting of the notice with a hyperlink to the NLRB decision  
7 or to the Board's website where the decision and order can be found. This is the twenty-first  
8 century. Most employees have access to the internet, including the Board's website, and including  
9 Board decisions involving their rights, at their place of employment. After a decision that an  
10 employer has violated the law and sabotaged employees' rights, such a notice should directly  
11 encourage the harmed employees to read the decision. Before the internet age, it may have been  
12 more cumbersome for an employer to make copies of a Board decision. In the 1930's, when these  
13 remedies were fashioned, it was difficult to make copies of the decisions and provide them to all  
14 employees. If those difficulties still exist, they evaporate if the office NLRB notice advises  
15 employees where they can locate an electronic copy on a public website.<sup>14</sup> There is no reason not  
16 to incorporate a link to the Board's decision or to cite to the Board's decision giving the website  
17 address where the decision can be found.

18 Ms Reilly should be required to read the notice in the same manner she announced the  
19 termination of Ms. Trespalacios. If she is no longer with the company, a manger of equal rank  
20 should read the notice in the same manner. The employer should be required to make a CD of Ms.  
21 Trespalacios returning to the plant and show that triumphant entrance into the plant in the same  
22 manner as it humiliated her with the playing of the CD of her termination.

23 The Charging Party excepts to the failure of the Administrative Law Judge to recommend  
24 that these findings be transmitted to the International Labor Organization to determine whether that  
25 body should take action against United Kingdom for failing to take action against Fresh and Easy.  
26 The Administrative Law Judge noted that the Charging Party had sought a remedy of requiring that

27 \_\_\_\_\_  
28 <sup>14</sup> The employees would know where to find the decision if they wanted to read it from home. Or  
from some other location.

1 the Board’s findings be transmitted to ILO. (See ALJ Decision, p. 8:1-12.) 2 Sisters is a fully  
2 subsidiary of a British corporation.

3 Charging Party takes exception to the failure of the Administrative Law Judge to  
4 incorporate by reference ILO Conventions 87 and 98:

5 Convention No. 87: Freedom of Association and Protection of the Right to  
6 Organize Convention, 1948

7 “Workers and employers, without distinction whatsoever, shall have the  
8 right to establish and ... to join organizations of their own choosing... Each  
9 Member...undertakes to take all necessary and appropriate measures to  
10 ensure that workers and employers may exercise freely the right to  
11 organize.”

12 Convention No. 98: Right to Organize and Collective Bargaining  
13 Convention, 1949

14 If the Board is unwilling to adopt and apply the norms of international workers’ rights to  
15 Section 7 jurisprudence, the Charging Party takes exception to the effectuality of the NLRB in its  
16 protection of workers’ rights in this country. The Charging Party request that the Board  
17 affirmatively seek guidance from the ILO.

18 The COFA processes complaints against nations that have not ratified Conventions 87 and  
19 98. For example, in a case arising from employer abuses at Delta Airlines, the COFA recently  
20 found that the United States governmental regime of the National Mediation Board inadequately  
21 supports employees attempting to organize. International Labor Organization: 357th Report of the  
22 Committee on Freedom of Association (June 18, 2010).

23 Perhaps the best method of bolstering the Board’s willingness and capacity to protect the  
24 core rights of freedom of association and organization would be a self-submitted NLRB complaint  
25 to the COFA. Such a complaint would hopefully result in a complete diagnosis of the problems  
26 with the administration of labor law in the United States, along with the ILO’s recommendations  
27 for improvement.

28 This misconduct should be referred to the appropriate international war crimes tribunal for  
prosecution of 2 Sisters and its employees for war crimes against workers.

Interest on the backpay should be assessed on a daily compounded basis. This issue is  
before the Board and we adopt the arguments made in support of such a remedy in those cases.

1 In addition, the remedy should require the intranet posting of the *Lufkin* notice.

2 Since the employer abused its worksite through the use of security guards, delaying voters,  
3 posting anti-union literature in the voting area and having security cameras on, any new election  
4 should be conducted off-site. The Board’s traditional practice of allowing on-site voting is  
5 contrary to any fair election. Why should an election be conducted at the premises of one side in  
6 the election process who is decided not neutral? The Board should, as a routine matter, where  
7 unions request such, conduct all elections, at least initial recognition elections, off the employer’s  
8 site. Alternatively the Board should adopt alternative voting procedures. See Ben Sachs, “Enabling  
9 Employee Choice: A Structural Approach to the Rules of Union Organizing”; 123 Harv. L. Rev  
10 655 (2010).

11 **XIII. CONCLUSION**

12 For the reasons stated above, these exceptions should be granted and the election  
13 overturned for additional reasons discussed herein. The Board should adopt additional remedies as  
14 to the discharge of Ms. Trespalacios.

15  
16 Dated: July 26, 2010

17 WEINBERG, ROGER & ROSENFELD  
18 A Professional Corporation

19  
20 By: /s/ David A. Rosenfeld  
21 DAVID A. ROSENFELD  
22 Attorneys for Charging Party

23  
24  
25  
26  
27  
28 124365/580088

**PROOF OF SERVICE**  
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On July 26, 2010, I served upon the following parties in this action:

Alan R. Berkowitz  
Catherine D. Lee  
Bingham McCutchen LLP  
Three Embarcadero Center  
San Francisco, CA 94111-4067  
[alan.berkowitz@bingham.com](mailto:alan.berkowitz@bingham.com)

Irma Hernandez  
Jean Libby  
National Labor Relations Board,  
Region 21  
888 South Figueroa Street  
Ninth Floor  
Los Angeles, CA 90017-5449  
Fax: (213) 894-2778

copies of the document(s) described as:

**BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

**BY EMAIL**

**BY FACSIMILE** I caused to be transmitted each document listed herein via the fax number(s) listed above or on the attached service list.

**BY MAIL** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on July 26, 2010.

\_\_\_\_\_  
/s/Katrina Shaw  
Katrina Shaw